

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division



IN RE:)
) Case No. 01-31387
John D. Nivens,)
) Chapter 7
)
Debtor.)
) Adv. No. 01-3204
)
)

Susan L. Sowell, Trustee in)
Bankruptcy for John D. Nivens,)

Plaintiff,)

vs.)

JUDGMENT ENTERED ON JUL 16 2002
**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

Virginia P. Nivens,)

Defendant.)
)
)
)
)

This transfer avoidance action was tried on May 16, 2002.
The Chapter 7 Trustee and Plaintiff, Susan Sowell, appeared for
the Estate. The Defendant, Virginia Nivens, appeared pro se.

STATEMENT OF THE CASE

John D. Nivens filed a voluntary Chapter 7 case with this
Court on May 18, 2001. Susan L. Sowell was appointed Chapter 7
Trustee for Nivens' bankruptcy estate.

On November 7, 2001, the Trustee sued the Debtor's wife,
Virginia Nivens, seeking to recover eight prepetition check
payments made by the Debtor to the Defendant, totaling \$9,548.50.
The Trustee contends these transfers were either preferences
pursuant to 11 U.S.C. § 547 or fraudulent conveyances pursuant to
11 U.S.C. § 548. In her answer, Virginia Nivens admitted receipt

of the payments (and almost all of the Plaintiff's other averments), but denied their avoidability. The Defendant's answer, coupled with her written discovery responses (which also admitted almost everything), led the Trustee to seek summary judgment.

The Court held two hearings on the Trustee's summary judgment motion. At those hearings Virginia Nivens claimed that the \$9,548.50 belonged to her and was not her husband's property. Consequently, the Court granted partial summary judgment to the Trustee on all but one of the section 547(b) prima facie preference elements--whether the money transferred was property of the Debtor within the meaning of sections 547(b) and 548(a).

A hearing to determine the ownership of the \$9,548.50 was held on May 16, 2002. Based on the evidence presented at the hearing and further consideration of the issue, the Court has concluded that the money transferred was property of the Debtor and, consequently, that three of the transfers constituted preferences under 11 U.S.C. § 547. The remainder constituted fraudulent conveyances under 11 U.S.C. § 548.

FINDINGS OF FACT

1. Before filing his Chapter 7 bankruptcy case, the Debtor maintained a checking account in his name at Bank of America.

2. In the year prior to the bankruptcy filing, the Debtor wrote the following eight checks to his wife from the Bank of America account:

<u>Check No.</u>	<u>Amount</u>	<u>Date Honored</u>
3052	\$2,000.00	8/2/01
3080	\$1,000.00	9/11/01
3096	\$ 75.00	10/6/01
3112	\$2,000.00	11/7/01
3109	\$ 52.00	11/30/01
3151	\$2,000.00	2/9/01
2964	\$2,000.00	4/4/01
3152	\$ 421.50	3/26/01
Total	\$9,548.50	

The Debtor was insolvent at the time he wrote each check.

3. Each of the checks received by the Defendant was negotiated and honored by the Debtor's bank on the dates shown above.

4. Because Virginia Nivens admitted all but one of the section 547(b) prima facie preference elements, if the transfers from her husband were of his property, those transfers would constitute preferences under 11 U.S.C. § 547 or, alternatively, fraudulent conveyances under 11 U.S.C. § 548.¹

5. However, Virginia Nivens denies that these transfers were of her husband's property, notwithstanding the fact that

¹Generally speaking, the distinction between preference payments under 11 U.S.C. § 547 or fraudulent conveyances under 11 U.S.C. § 548 is whether a valid debt is owed to the transferee. A transfer for no consideration is a fraudulent conveyance pursuant to section 548, and a transfer on account of an antecedent debt is a preference pursuant to section 547.

they were made from his personal checking account. Furthermore, the Nivens' explanation of why the money did not belong to John Nivens has changed over the course of this litigation. At the summary judgment hearings, the Nivens argued that the money in question was owner's draws paid to Virginia by her company, TD Sports, and that these payments were only routed through the Debtor's bank account as a convenience.

6. However, when pressed about the ownership of the money at trial, the Nivens changed their story and claimed that the payments were reimbursements by John to Virginia for his share of family expenses.

7. Obviously, one of these two stories is not true. Thus, the Court can not give weight to the Nivens' uncorroborated explanations regarding the ownership of the \$9,548.50. Moreover, the evidence presented does not tend to support either of the Nivens' contradictory theories.

8. Rather, on this record, it appears that the money in question was John Nivens' property, being his income. Furthermore, with only three exceptions, it appears that the money was transferred by the Debtor to Virginia to place it out of harm's way.

9. As to those three exceptions, the Nivens' sufficiently demonstrated that checks no. 3096 (\$75), 3109 (\$52), and 3152 (\$421.50) reimbursed Virginia for household repairs, homeowner's dues, and credit card charges respectively.

10. Apart from this, however, the Defendant has failed to demonstrate that (i) the \$9,548.50 did not belong to the Debtor,

or that (ii) the payments in question reimbursed her for the Debtor's share of living expenses.

CONCLUSIONS OF LAW

1. As a transfer avoidance action under 11 U.S.C. §§ 547 and 548, this is a "core proceeding". 28 U.S.C. § 157. This Court has subject matter jurisdiction over the same. 28 U.S.C. § 1334.

2. Under section 548, a trustee may avoid any transfer of an insolvent debtor's property made within one year of bankruptcy which was intended to hinder, delay, or defraud creditors, or which was made for less than reasonably equivalent value. 11 U.S.C. § 548 (a) (1) (A) & (2).

3. Alternatively, if the transfer paid a valid debt, under section 547(b) the trustee may recover the same if it enabled the creditor to receive more than other unsecured creditors would from a Chapter 7 distribution. In addition, a preferential transfer made to an "insider" of the debtor within one year of bankruptcy can be attacked if the debtor was insolvent at the time the transfer was made. 11 U.S.C. § 547 (b) (4) (B).

4. The Debtor's spouse, Virginia Nivens, is an insider. 11 U.S.C. § 101 (31) (A) (1).

5. The Trustee bears the burden of proving the section 547(b) prima facie elements of a preference and or the elements of a fraudulent conveyance. 11 U.S.C. § 547(g) and 11 U.S.C. § 548. Likewise, the Defendant has the burden of proving

affirmative defenses to a preference under section 547(c) and defenses to a fraudulent conveyance under section 550.

6. In addition, when the claim of an insider is involved, strict scrutiny applies. In such a situation, the insider has the burden of demonstrating the fairness of his or her transactions with a debtor. *Pepper v. Litton*, 308 U.S. 295, 306, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939).

7. With the exception of the ownership of the \$9,548.50, the prima facie elements of an avoidable transfer are not disputed.

8. As to the ownership issue, the Trustee has made a prima facie showing that the \$9,548.50 was the Debtor's property, having demonstrated that the payments were made from the Debtor's personal bank account and made to an insider. As the Fourth Circuit Court of Appeals has held:

In the context of Section 548(a)(1)(A), courts closely scrutinize transfers between related parties. Indeed, such transfers, if made without adequate consideration, create a presumption of actual fraudulent intent.

This presumption establishes the trustee's prima facie case and shifts the burden of proof to the debtor to establish the absence of fraudulent intent."

In re Smiley, 257 F.3d 401 (4th Cir. 2001) (citations omitted).

9. Although this action has been brought against the Debtor's wife rather than the Debtor, the same logic applies. A presumption lies that the money transferred was John Nivens'

property. This completes the Trustee's prima facie case of an avoidable transfer.²

10. The burden then switches to Virginia Nivens to show an affirmative defense to these otherwise avoidable transfers. Affirmative defenses to otherwise avoidable transfers are set out in sections 547(c) and 550.

11. With only the aforementioned three exceptions, the Defendant has failed to establish that the \$9,548.50 was not the Debtor's property or to show any affirmative defense to the avoidance action.

12. Virginia Nivens initially argued at the summary judgment hearings that each check was a pass through, as TD Sports would deposit the Defendant's owner's draw into the Debtor's checking account, and the Debtor would contemporaneously write the Defendant a check in the same amount as the initial owner's draw.

13. It is undisputed that Virginia Nivens is a co-owner in TD Sports. The remainder of the Defendant's argument--that each check was a pass through--is contradicted by the evidence.

14. Six years ago, John Nivens, an accountant and resident of Charlotte, North Carolina, bought Bombat Sports (hereinafter

²The question remains whether the avoidable transfer is a prima facie preference or instead a fraudulent conveyance. The answer depends on whether a debt was owed to the transferee. Despite the wording in section 547(g), the Trustee lacks any incentive to prove the existence of a debt, and practically, this burden is borne by the Defendant.

referred to as "Bombat"). Bombat manufactured baseball bats in a plant located about forty-five miles from Charlotte.

15. Under the Debtor's leadership, Bombat's business floundered, and the company closed its doors in May 1999. In December 1999, Bombat's bank foreclosed on all of the company's assets.

16. Virginia Nivens is a seventeen year Postal employee who works in Charlotte. She has never been in the bat business. Nevertheless, when the bank foreclosed on Bombat, Virginia and Tony Deddario, Bombat's plant manager, formed TD Sports to purchase the Bombat equipment. Since that time, TD Sports has operated a bat manufacturing business in the same location and has served many of the same customers as did Bombat.

17. Virginia Nivens has not been active in the day-to-day operations of TD Sports.

18. At the summary judgment hearing, Virginia Nivens testified that she and Deddario, as co-owners of TD Sports, would take periodic draws from the business. In processing Virginia's draws, Deddario would write a TD Sports check made payable to John Nivens and physically hand the check to the Debtor. According to the Nivens, the Debtor would then immediately deposit the money into his personal checking account at Bank of America, and he would simultaneously write the Defendant a check in the same amount from his account, thus "passing" TD Sports' payments to Virginia through his account. This practice, according to the Nivens, was done for banking convenience. Thus,

Virginia Nivens argued that the money never belonged to John Nivens as it was TD Sports' payment to her.

19. The Court does not accept this explanation for several reasons. The primary one is that the Nivens' appeared to recant this explanation at trial in favor of the reimbursement of family expenses theory.

20. While Virginia Nivens is nominally a co-owner and put up the money to start TD Sports, on this record the Court must conclude that these "draws" were really compensation to John.

21. The Nivens would have the Court believe that John Nivens was medically disabled, unemployed, and not involved in the operations of TD Sports. However, the facts presented at trial show otherwise. During the one year period in question, John Nivens was at the TD Sports plant on a daily basis. Given the distance between his residence and the TD Sports' office, the Court does not accept the Defendant's contention that he was just hanging around. Virginia, on the other hand, was a postal employee working in Charlotte.

22. Contrary to his assertions, the Debtor was not unemployed. Rather, the evidence shows that he continued to handle TD Sports and Bombat business during the time period in question. For example, the Debtor's checking account records show up to \$55,000 per month in deposits--an extraordinarily high amount for an unemployed person. Moreover, the Debtor's bank records show numerous deposits and disbursements not only for

personal transactions, but for the ostensibly defunct Bombat, and for TD Sports.

23. In short, John Nivens was working for TD Sports and the payments in controversy appear to be for his services. The owner's draws simply appear to be a dodge to avoid paying employment taxes, or perhaps to enable him to draw disability income, although this is not clear from the evidence.

24. In addition, the bank records do not establish the Defendant's theory that the Debtor's checking account was a conduit for her owner's draws. For example, the amounts paid by John Nivens to Virginia were often less than what TD Sports had deposited into the Debtor's account. In addition, the payments were not all immediate pass throughs, as described. Sometimes John Nivens would write a check to his wife on the same day as the TD Sports' deposit. Other times, however, the Debtor would wait several days after the TD Sports' deposit was made to write his wife a check. And on at least one occasion, the Debtor wrote a check to his wife before TD Sports made its deposit. If this was a conduit, it was a partially clogged pipe.

25. In sum, on the evidence presented the Court can not conclude that the Debtor's transfers of money to Virginia Nivens were anything other than transfers of John Nivens' money due to the change in the Defendant's story, her lack of participation in the business, and the inconsistency in the amounts and timing of TD Sports' payments to John and his to Virginia.

26. At trial, the Nivens advanced a new theory that the checks in question were payments of the Debtor's share of family living expenses under a pre-marital agreement between the Nivens. John Nivens testified that before marrying Virginia Nivens, he had agreed to pay her \$2,000 a month for his part of the mortgage, maintenance, and other household bills.

27. No mention of the alleged pre-marital agreement was made before trial, and there is no extrinsic evidence of such an agreement. In addition, because the Nivens' testimony regarding the pre-marital agreement contradicts everything else the Defendant has stated in this case, (including her pleadings, discovery responses, and testimony at the summary judgment hearing), the Court will not accept this unsupported statement. While it is possible that the payments in question were in consideration for the Debtor's share of the household expenses, it is more likely that John was making these transfers to keep money out of his name. The Debtor owed large personal debts at the time.

28. Thus, under either theory, the Defendant has failed to meet her burden of proof of establishing an affirmative defense, with only three minor exceptions. As noted above, the Defendant sufficiently demonstrated that checks 3096 (\$75), 3109 (\$52), and 3152 (\$421.50) were reimbursements to her. The Court will treat these payments as being on account of antecedent debts owed to

Virginia. Consequently, these payments are preferences under section 547 rather than fraudulent conveyances.³

29. The remainder of these transfers are fraudulent conveyances under section 548 and avoidable under section 550.

It is therefore ORDERED:

1. The \$9,548.50 transferred from the Debtor to Virginia Nivens was property of the Debtor within the meaning of sections 547(b) and 548(a).

2. The following transfers are avoided under section 548 as fraudulent conveyances, and the Trustee shall have judgment of the Defendant for the amount of the same:

<u>Check No.</u>	<u>Amount</u>
3052	\$2,000
3080	\$1,000
3112	\$2,000
3151	\$2,000
2964	<u>\$2,000</u>
Total	\$9,000

3. Checks 3096 (\$75), 3109 (\$52), and 3152 (\$421.50) were transferred on account of antecedent debts and are preferences under section 547. Consequently, the Trustee shall have judgment of the Defendant for the amount of the same:

<u>Check No.</u>	<u>Amount</u>
3096	\$ 75
3109	\$ 52
3152	<u>\$421.50</u>
Total	\$548.50

³Unfortunately for the Defendant, there is not enough evidence to show when these debts were incurred, so she is unable to make out a section 547(c) defense.

4. Interest shall accrue on these sums at the federal rate from the date of judgment.

5. Judgment shall be issued accordingly.

This the 15th day of July, 2002.



U.S. Bankruptcy Court